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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-105

GARY STEPHEN GORDON,
Petitioner,

VERSUS

MAXINE DEE GORDON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented for Review	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting Writ of Certiorari	7
The Oklahoma Supreme Court's Reversal of Petitioner's Award of Custody Is Premised Upon a Direct Disparity of Treatment Based Upon Petitioner's Sex	8
The Majority Opinion of the Oklahoma Supreme Court Is Not in Accord With Decisions of This Court Relating to Sexual Classifications	13
A Direct Conflict Exists Between State Courts Regarding Application of This Court's Decisions Related to Sex Discrimination	20
Conclusion	22

APPENDICES

Appendix A:	
Opinion of the Oklahoma Supreme Court (Gordon v. Gordon, Okl., 577 P.2d 1271)	A-1
Appendix B:	
Decree of Divorce of Oklahoma District Court, No. JFD-75-232	B-1
Appendix C:	
Petition-in-Error of Appellee Gary Stephen Gordon, filed in Sup. Ct. of Okla., Feb. 27, 1976	C-1

TABLE OF AUTHORITIES

CASES: PAGE

Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954) 16
Brim v. Brim, Okl.App., 532 P.2d 1403 (1965) 11
Commonwealth v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968) 17
Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed. 2d 397 (1976) 19
Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) 17
Harper v. Virginia, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) 16
Irwin v. Irwin, Okl., 416 P.2d 853 15
Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 794 (1944) 16
Liberti v. York, 28 Conn. Super. 9, 246 A.2d 106 (1968) 17
Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L. Ed.2d 1010 (1967) 16, 17
McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961) 16
Morrow v. Morrow, Okl., 383 P.2d 24 (1963) 11
Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971) 17
Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1125, 86 L.Ed. 1655 (1942) 16
Stanton v. Stanton, 421 U.S. 7, 95 S.Ct. 1373, 43 L. Ed.2d 688 (1975) 17
State ex rel. Watts v. Watts, 77 Misc.2d 178, 350 N.Y.S.2d 285 (1973) 20-21
Sumrell v. York (D. Conn., 1968), 288 F.Supp. 955 .. 17

AUTHORITIES CONTINUED PAGE

U. S. ex rel. Robinson v. York (D. Conn., 1968), 281 F.Supp. 8 17

UNITED STATES CONSTITUTION:
Amendment Fourteen 3

U. S. STATUTES:
28 U.S.C. § 1257(3) 2

OKLA. STATUTES:
30 Okl. Stat. 1971, § 11 ..... 3, 11, 14

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

The petitioner, Gary Gordon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Oklahoma entered in this proceeding on February 7, 1978.

OPINIONS BELOW

The Opinion of the Oklahoma Supreme Court is reported in *Gordon* v. *Gordon, Okl.*, 577 P.2d 1271, and appears as Appendix A hereto. The Decree of Divorce of the Oklahoma District Court in cause Number JFD-75-232, appears as Appendix B hereto.

JURISDICTION

The decision of the Oklahoma Supreme Court was entered on February 7, 1978, and a timely petition for rehearing was denied on April 19, 1978. This petition for writ of certiorari was filed within ninety days of such denial of rehearing. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1257(3) for reason that the validity of a state statute is questioned on the grounds that it is repugnant to the Constitution of the United States.

QUESTION PRESENTED FOR REVIEW

Whether a statutory presumption favoring mothers in custody conflicts involving young children, commonly known as the "tender years presumption," works as unconstitutional discrimination against fathers. Specifically, did application of such a legislative and judicial classification premised upon unalterable sex characteristics which resulted in Petitioner's loss of custody of his child, constitute an unconstitutional denial of Petitioner's right to equal protection of the law under the Fourteenth Amendment to the United States Constitution? Stated more broadly, is gender-based discrimination based upon purported "cultural, psychological and emotional" differences between the sexes constitutional and, if so, who has the burden of proving such differences?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment Fourteen to the United States Constitution:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

30 Okl. Stat. 1971, §11:

> "In awarding the custody of a minor, or in appointing a general guardian, the court or judge is to be guided by the following considerations:
>
> "1. By what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare; and if the child be of sufficient age to form an intelligent preference, the court or judge may consider that preference in determining the question.
>
> "2. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child be of tender years, it should be given to the mother; if it be of an age to require education and preparation for labor or business, then to the father."

STATEMENT OF THE CASE

Petitioner seeks a Writ of Certiorari to the Oklahoma Supreme Court from a decision reversing the judgment of the District Court of Oklahoma County Oklahoma. Proceedings giving rise to this action arose in January of 1975 when the plaintiff below, Maxine Gordon, brought an action of divorce against the Petitioner. Both Maxine Gordon, referred to hereinafter as the plaintiff, and Petitioner prayed in their respective Petition and Cross-Petition that they be granted custody of their child, Danny Gordon. The child was born in January of 1973. In January of 1976 trial was held before the District Court of Oklahoma County in Oklahoma City, Oklahoma, and the court granted the divorce, made a division of the property and upon the determination that such was in the child's best interest, granted custody of the then three-year-old boy to his father, the Petitioner, with reasonable visitation rights to the plaintiff. (Decree of Divorce is attached hereto as Appendix B.) Plaintiff perfected her appeal to the Oklahoma Supreme Court and asserted error by the trial court in awarding custody to the Petitioner. In February of 1976, upon application of the plaintiff, the Oklahoma Supreme Court entered its order staying enforcement of the District Court's award of custody to the Petitioner. Pursuant to the Petitioner's motion to modify such a stay order, the Oklahoma Supreme Court appointed the Judge of the District Court as its Special Master to conduct further proceedings in order to make findings of fact and law and to make recommendations regarding custody of the child pending appeal. A hearing was held in May of 1976 and the Special Master found the plaintiff to be unfit to have custody and recommended that custody be awarded to the Petitioner. The Oklahoma Supreme Court approved such recommendation in July of 1976 and ordered that the child be placed in the custody of the Petitioner pending disposition of the appeal. The boy remained in the custody of the Petitioner from July of 1976 until May of 1978.

Pursuant to regular appellate procedure in Oklahoma, plaintiff and Petitioner submitted their briefs to the Oklahoma Supreme Court with Petitioner's Appellee's Brief being filed with the Court in December of 1976. Plaintiff's principal contention of error by the trial court was based upon the position that the trial court had failed to apply a presumption favoring mothers in matters involving custody of children of tender years. Plaintiff argued that the above-cited Oklahoma statute, 30 Okl. Stat. 1971, §11, as interpreted by the Oklahoma courts, required that a trial court award custody of such a child to the mother rather than the father unless the mother was specifically found to be an "unfit" custodian. Petitioner's counter-argument in support of the decision of the trial court relating to the foregoing argument of the plaintiff was centered upon the position that Oklahoma courts were no longer bound to award mothers custody absent a finding of unfitness and that application of any such rule, whether legislative or judicial in its origin, favoring a party on the basis of their sex would constitute an unconstitutional denial of Petitioner's right of equal protection of the law as such right has been recently examined and defined by this Court. Petitioner supported a true application of the often recited but seldom employed standard that the sole criteria in such cases should be the child's best interest.

The above referenced federal question was raised for the first time in these proceedings by way of the plaintiff's Petition-in-Error, attached hereto as Appendix C, with Petitioner's subsequent assertion that the "tender years presumption" invoked by the plaintiff was repugnant to the United States Constitution.

On February 7, 1978, the Oklahoma Supreme Court filed its opinion (Appendix A) reversing the trial court, finding 30 Okl. Stat. 1971, §11 to be constitutional, awarding custody of the child to the plaintiff and remanding the action to the District Court with instructions to conduct hearings on the issue of Petitioner's visitation and child support. Petitioner made timely petition for rehearing, and, subsequent to extensive briefing, the Oklahoma Supreme Court denied rehearing on April 19, 1978. As directed, on June 8, 1978, the District Court conducted a hearing to determine Petitioner's right to visitation with his child and the amount of child support to be awarded.

The appellate phase of this action has been limited from its inception solely to the issue of custody of the minor child.

REASONS FOR GRANTING WRIT OF CERTIORARI

Prior to discussing the various aspects of this cause from the standpoint of their effect upon the Petitioner, brief mention will be made of a factor which is, perhaps, so evident that it needs little comment. While Petitioner knows of no reliable statistical measurement of the frequency that judicial determinations as to custody of children must be made, the fact that such a situation is at least one of the more common issues confronting the legal system and one that touches the lives in a very substantial way of a vast number of persons is readily perceived by the most casual observer. Without risk of exaggeration it can be said that determinations of custody of children in divorce actions is a matter of great importance to a great many persons and is an issue which deserves thoughtful and serious legal consideration.

There are, of course, a good number of elements involved in sound decisions regarding the often hoary question of granting one parent and denying the other parent custody of their child and the present petition seeks review of only one of these factors. However, inasmuch as that single criteria involves differentiation in legal treatment based upon the sex of the divorcing parents, it would be difficult to propose a more universal factor involved in such actions.

At its simplest level this petition seeks a review of the legislative and judicial practice, as embodied in the decision of the Oklahoma Supreme Court, of basing awards of custody to a large measure upon the sex of the parties. As

might be supposed, Petitioner is hopeful that such a review will not only be granted but that the ultimate decision of this Court would result in an elimination of this sexual preference favoring women and that the demise of such gender-based favoritism would give way to the often recited but not wholly consistent goal of deciding the custody of a child solely upon what is shown to be in that child's best interests.

The Oklahoma Supreme Court's Reversal of Petitioner's Award of Custody Is Premised Upon a Direct Disparity of Treatment Based Upon Petitioner's Sex

A careful review of the appended opinion of the Oklahoma Supreme Court reveals a line of reasoning with attendant application of law relating to a substantial and very pervasive question involving the constitutionally guaranteed right to equal protection of the law which is wholly at odds with decisions of this Court. Specifically, the Oklahoma Supreme Court has, by its decision in this action, determined that a statutory method of discriminating against persons solely on the basis of their sex to be a constitutionally acceptable application of law, and, while no decision by this Court has been found dealing with the particular question of such classification in divorce-custody disputes, the decision from which this request for a writ of certiorari is made is inconsistent with every recent pronouncement by this Court on matters of sex discrimination.

The immediately foregoing comment was prefaced with the qualification of a careful reading of the decision for reason that the Oklahoma majority opinion may, by casual

reading, appear to involve essentially a factual question with what might perhaps be seen as a peripheral reference to the constitutional issue. Petitioner proposes, however, that a studied inspection of the opinion reveals just the opposite. That is, the very foundation upon which the Oklahoma Court has built its discussion of the factual aspects of the case can only make sense and contain even a modicum of internal consistency if that court's ultimate acceptance of sex-based favoritism is recognized. It is the standard by which the facts are reviewed which the Petitioner proposes to be repugnant to the United States Constitution. It might be argued, and indeed has been argued by the plaintiff in her brief in opposition to rehearing below, that the decision of the Oklahoma Supreme Court can be justified as a simple matter of the evidence not supporting the trial court's award of custody to the Petitioner. Such a position, of course, has a certain amount of simplistic appeal but it does not answer the ultimate question regarding the criteria by which the Oklahoma Supreme Court would have the trial court judge the unique facts of the case. The answer may be found in the majority opinion and it involves a pure and relatively simple form of the very sort of sex discrimination previously disapproved by this Court.

That the facts of the cause are inexorably tied to the critical constitutional question is exemplified by the Oklahoma Supreme Court's apparent quandary in attempting to retain its traditional support of the doctrine that a mother be granted custody unless she were found to be unfit, or, conversely, that a "fit" mother would be the preferred cus-

todian without regard of the relative parental merits of the father.

For lack of a better term such a rule shall be referred to herein as the "fitness rule." Any indication of an intent to abandon the "fitness rule" is belied by the balance of the opinion, and is hinted at on page 1277 of the opinion (Appendix A) when the court notes that the admitted "gender preference" should be employed when the scales are *"relatively"* balanced. While such words of art are often quite necessary as moderating factors to the law, when read in conjunction with the rest of the opinion, the inclusion in this decision of such a qualifier leads one to believe the entire statement is more for show than substance. The obvious question presenting itself to anyone attempting to apply this decision to other cases must surely be, "how relative"? And the answer supplied by the ultimate conclusion of the court is, "not very."

The Oklahoma Supreme Court's unwillingness to actually abandon the conspicuous discrimination of the "fitness rule" in favor of a more rational sounding, veiled form of favoritism only when factors are "relatively" balanced, can be seen in the fact that the court repeatedly made approving mention of the plaintiff's argument that she should have been awarded custody because she had not originally been found to be "an unfit mother." The court's own discription of the appeal in its first sentence of the opinion states that the action was an ". . . appeal by the wife from a trial court's award of custody of a three-year-old child of the parties to the husband in a divorce action *absent a finding of unfitness on the part of the mother.*" (Appendix

A at page 1272, emphasis added.) It is also noteworthy that in its discussion of 30 Okl. Stat. 1971, §11, the court referred to the fitness or lack of unfitness of the plaintiff no less than seven additional times; three of such references occurring by way of rejecting Petitioner's argument that a mother need not be found to be unfit in order for the father to qualify for custody, and the remaining references to the rule being made in commentary apparently approving the plaintiff's argument that a mother *must* be awarded custody unless she is clearly shown to be unfit.

Without going into greater detail, it should also be noted that the majority decision rejects two Oklahoma opinions cited by the Petitioner in support of what appeared to be a prior abandonment of the "fitness rule" in custody disputes in favor of simply attempting to determine the child's best interest without benefit of gender-based preconceptions, *Morrow* v. *Morrow*, Okl., 383 P.2d 24 (1963) and *Brim* v. *Brim*, Okl.App., 532 P.2d 1403 (1965). The court distinguished these decisions for reason that they arose from actions to modify divorce decrees rather than from divorce actions themselves. Petitioner directs attention to this extraordinary result of the majority opinion whereby the standards used to determine custody and presumably the child's best interest somehow vary according to the nature of the proceeding. Such a result is not only peculiar but is also one more indication that the Petitioner is but another victim of the unproven but entrenched concept that parental ability is a direct and proximate function of gender. In other words, the very factor which dictated the Petitioner's status as a father also impaired his position before the law. The decisive factor weighing

against the Petitioner was not his parental ability but his sex.

Prior to noting the particular decisions of this Court which are not in accord with the present ruling, it should be pointed out that the Oklahoma Supreme Court approvingly recites in its own words the following condensation of the plaintiff's position:

> "Plaintiff cites numerous decisions of this Court decided under 30 O.S. 1971, §11, which set forth the general rule that in this jurisdiction the mother is recognized as the natural and preferred custodian of a child of tender years; *that other things being equal, unless the mother is clearly shown to be an improper person to be trusted with its care and custody,* a child should be placed in her custody." 577 P.2d 1271 at 1274 (Appendix A, emphasis added.)

When the immediately preceding and internally contradictory statement (*i.e.*, the gender-based instructive portion of the statute is to be employed when other things are equal *unless* the mother is unfit—the latter provision destroying the meaning of the former) is read in conjunction with the conclusion of the court that "[p]laintiff was shown to be a fit and proper person to have Danny's custody and the award of the custody in the defendant was clearly against the weight of the evidence" (Appendix A at page 1277), there is little room for doubt that the "fitness rule" with its inherent sex-based discrimination is alive and well in Oklahoma and has worked its mischief against yet another father, the Petitioner.

The Majority Opinion of the Oklahoma Supreme Court Is Not in Accord With Decisions of This Court Relating to Sexual Classifications

While some confusion may legitimately exist as to the precise constitutional boundaries of equal protection as related to sex discriminations, it is reasonable to suppose that the position taken by the Oklahoma Supreme Court falls quite wide of all the recent discussions of the issue by this Court, and it seems unlikely that the decision would withstand application of even the least rigorous standards.

It being apparent that the majority opinion of the Oklahoma Supreme Court relied upon a presumption favoring mothers of young children as a necessary element in arriving at the ultimate reversal of the trial court, it might be helpful to attempt to sort out those portions of the opinion which offer an indication of the rationale relied upon by the Oklahoma court to justify its invocation of the maternal preference. The majority summarized with apparent approval the plaintiff's argument that the statutory discrimination favoring women was proper and desirable in child custody cases by stating as follows:

> ". . . in this jurisdiction the mother is recognized as the natural and preferred custodian of a child of tender years. . . . The rule further recognizes that a child of tender years needs the constant bestowal of its mother's care and love . . ." (Appendix A at page 1274)

After a discussion rejecting one of the Petitioner's arguments that sex discrimination had been previously determined by this Court to be of an inherently suspect nature, the majority opinion suggests that the historical

basis for the discrimination contained in 30 Okl. Stat. 1971, §11 was the ". . . old notion that a child of tender years needs a mother more than a father . . ." and that the gender-based roles established by ". . . traditional patterns of thought . . ." dictate that children should be in the care of their mother. The decision of the Oklahoma court adds still more preconceptions, if no supportive facts, when it notes the proper role of an awareness of ". . . obvious and essential biological differences . . ." and the ". . . cultural, psychological and emotional characteristics that are gender related . . ." (Appendix A at page 1277)

It is significant that none of the factors upon which the Oklahoma court supported its *guesses* as to the original legislative intent in enacting what is now 30 Okl. Stat. 1971, §11 (Stat. of Okl., 1890, Chapter LXIII, Article 3, §11) were based upon any known legislative history nor were any of the gender related role generalizations employed by the court supported by the evidence for the simple reason that no such evidence had ever been submitted in these proceedings. Petitioner had even suggested in his Petition for Rehearing to the Oklahoma Supreme Court that it might indeed be proper for that court to remand the cause for purpose of conducting an evidentiary hearing into the legislative purpose and to determine if there was any contemporary evidence which might justify the classification. While the Oklahoma majority declined to call for or allow such presentation of evidence, choosing rather to stand on its apparent "judicial notice" of sex characteristics, the opinion does reflect a marked secular trend in the judicial justification for unequal treatment of parents. Whereas the Oklahoma majority now endorses sex-based disparity of

treatment as being justified by such factors as "traditional patterns of thought," "old notions" and "cultural, psychological and emotional characteristics," as late as 1966 the Oklahoma Supreme Court supported such sexual preference as being a matter of "divine justice." *Irwin* v. *Irwin*, Okl., 416 P.2d 853. Petitioner knows that no evidence had been presented in this action to support the court's present conclusions and suspects that such was also the case a dozen years ago in the *Irwin* case.

The salient point of this commentary relating to the majority opinions' reliance upon unproven notions regarding the gender-based parental roles is that such attempts to justify sexual discriminations no longer meet the constitutional criteria outlined by this Court.

There can be no doubt that the majority opinion of the Oklahoma court supports unequal treatment of two classes of citizens and that such classification is based solely upon those persons' sex. Given the fact of such disparity of treatment, the issue presented herein involves whether such action falls within constitutionally acceptable parameters. It necessarily follows, then, that the classification must be measured against some standard in order to judge its constitutionality and the question of what standard to apply has prompted the submittal of the present Petition.

As is often the case during periods of re-evaluation and transition in a particular area of constitutional law, definitive standards are somewhat illusive. This is not to say, however, that in many instances such a standard cannot be determined. Petitioner suggests that the opinion of the Oklahoma court fails to conform to even the well estab-

lished *minimum* standard. The range of possible criteria by which a statutory classification may be reviewed runs from the traditional view that such action shall be presumed to be constitutional if it is rationally related to a permissible public purpose and that the evidence necessary to demonstrate such characteristic may be adduced by judicial notice with the permissible legislative purpose being presumed. Under such rule the burden of proof in a constitutional dispute falls upon the party attempting to show unconstitutionality. See generally, *McGowan* v. *Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).

Of course, such an attitude gradually gave way to a far different standard particularly as related to classifications based on such factors as race, alienage, and economic status. The presumption arose that such legislation was "inherently suspect," *Korematsu* v. *United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 794 (1944), "constitutionally suspect," *Bolling* v. *Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954) or "essentially suspect," *Loving* v. *Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) and were subject to "the most rigid scrutiny," *Korematsu* v. *United States* (supra), "strict scrutiny," *Skinner* v. *Oklahoma*, 316 U.S. 535, 62 S.Ct. 1125, 86 L.Ed. 1655 (1942) or are "closely scrutinized," *Harper* v. *Virginia*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). Pursuant to these and other decisions the rule was established that if the criteria for the classification was disfavored, the burden rested not with the attacker of the "inherently suspect" discrimination to demonstrate unconstitutionality but rather was born by the defender of the discrimination to prove constitutionality, and such burden was not easily discharged. The

defender of the discrimination had a "very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to [suspect classifications]" *Loving* v. *Virginia* (supra).

For some years gender was not included in those areas subject to the heightened standard of review. Subsequent to several lower court decisions whereby sex discrimination was judged by a higher (but not necessarily highest) standard, *U. S. ex rel. Robinson* v. *York* (D. Conn., 1968), 281 F.Supp. 8; *Commonwealth* v. *Daniel*, 430 Pa. 642, 243 A.2d 400 (1968); *Sumrell* v. *York* (D. Conn., 1968), 288 F.Supp. 955 and *Liberti* v. *York*, 28 Conn. Super. 9, 246 A.2d 106 (1968), this Court redered its decision in *Reed* v. *Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), and while not going so far as to hold sex to be as "suspect" as race, the Court did subject the sexual discrimination to a considerably more strict standard than the traditional "rational relationship" test and the burden of attempting to establish constitutionality was squarely placed upon the defender of the classification.

This Court followed the *Reed* [illegible] *Frontiero* v. *Richardson*, 411 U.S. 677, 93 S.Ct. [illegible] L.Ed.2d 583 (1973), which not only continued to treat sex discrimination on a par with race discrimination but, in fact, spoke in terms of it possessing an inherently suspect status. The strong language of *Frontiero* was somewhat moderated in *Stanton* v. *Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975), wherein the Court declared that it had not actually determined the standard to be applied to sexual classification. The Court in *Stanton* did not, however, abandon the

concept of a heightened standard of review in sex discrimination matters and, in fact, took the opportunity to specifically reject the Utah Supreme Court's reliance upon "old notions" and "widely accepted idea[s]" as supportive of age-sex discriminations. It is interesting to note the Oklahoma opinion's adoption of and reliance in the instance case of what the Utah court is now calling "traditional patterns of thought" regarding "roles of mother and father" (Appendix A at 1277) as well as the Oklahoma court's gratuitous inclusion of the term "old notions" to support its finding of constitutionality.

The Oklahoma majority opinion refers to *Reed* and *Frontiero* and points out that both involved only matters of administrative convenience and that *Frontiero* was a plurality opinion which had not been followed in regard to its characterization of sex being a "suspect" classification.

Petitioner would at this point briefly comment upon the attempt by the Oklahoma court to distinguish cases involving gender-based classification whose purpose was to achieve "administrative convenience" and the classification involved in the present action. It is suggested that there is no real difference between imputing what is perceived as a general sexual characteristic to a class as a whole and formalizing such preconception into rules of law for administrative convenience or for judicial convenience in determining custody. In both instances the generalization is just that; a method of grouping people together for unequal treatment without regard to characteristics which might be possessed by individuals within the class.

Moving on to more recent decisions of this Court relating to sexual classifications the case of *Craig* v. *Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), presents an interesting situation from several aspects. That decision, which also arose out of Oklahoma, was handed down by the Court only a few days after the appellate briefing in the instant action was completed. It might be recalled that *Craig* involved another Oklahoma Statute which differentiated between males and females in setting out the age at which persons could purchase 3.2 beer. The State attempted to defend the statute on the basis that the Legislature's motive in enacting the statute may have been to promote the interest of public safety. An attempt was made to support such position by statistical evidence but this Court determined that the burden of establishing the constitutionality of the statute had not been met and that the sex discrimination involved therein was violative of the plaintiff's constitutional rights.

Amazingly enough, however, the Oklahoma Supreme Court cited the *Craig* decision as supportive of its position that the sex discrimination embodied in Oklahoma custody law did not violate constitutional standards even though there was a complete absence of any evidence relating to a justification for the classification. The Oklahoma court noted that the *Craig* case had established a "middle tier" standard of review for gender-based classifications and then went on to point out that the Petitioner herein had not met his burden of *proving* that the classification was unconstitutional. Such a result was reached despite the fact that in the *Craig* case this Court found that the supporter of the classification had the burden of proving its justification

and had, in fact, failed to meet such burden. The Oklahoma court has completely reversed the clear import of the *Craig* case and has not only ignored this Court's ruling that sexual classifications must at least be supported by convincing imperical evidence in order to be found constitutional but has instead substituted its own preconceptions regarding sexual roles. It is this very sort of unsupported categorization which has in recent years been rejected by this Court.

A Direct Conflict Exists Between State Courts Regarding Application of This Court's Decisions Related to Sex Discrimination

By virtue of the decision of the Oklahoma court in this action, there exists a pointed and direct conflict between jurisdictions regarding the application of the standards determined by this Court to apply to gender-based classifications. While the discriminatory "tender years doctrine" has been abandoned in several states on statutory or policy grounds, a striking example of the direct constitutional conflict may be seen by way of a comparison of the present Oklahoma decision and the New York case of *State ex rel. Watts* v. *Watts*, 77 Misc.2d 178, 350 N.Y.S.2d 285 (1973). Whereas the Oklahoma court addressed the constitutional issue raised by the presumption favoring mothers and found that such doctrine was not unconstitutional, the New York court examined the decisions of this Court and arrived at the diametrically opposite conclusion that application of the "tender years presumption" could stand on neither policy nor constitutional grounds. The very fundamental conflict between New York and Oklahoma law as determined in the present majority opinion is vividly demonstrated in the following language from *Watts* v. *Watts* (supra):

> "Finally, application of the 'tender years presumption' would deprive respondent of his right to equal protection of the law under the Fourteenth Amendment to the United States Constitution
>
> * * * * * * *
>
> "Recent decisions of the Supreme Court of the United States make clear that differential treatment on the basis of sex of the kind created by the 'tender years presumption' is 'suspect' and therefore subject to the strictest judicial scrutiny. In Fronterio v. Richardson (411 U.S. 677, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583, 1973) the court made explicit the incurable flaw in rules of law which accord different treatment of men and women on the basis of rigid and outdated sexual sterotypes:
>
> * * * * * * *
>
> "Thus message of Fronterio is clear: persons similarly situated, whether male or female, must be accorded evenhanded treatment by the law. Legislative classifications may legitimately take account of need or ability; they may not be premised on unalterable sex characteristics that bear no necessary relationship to the individual's need, ability or life situation. (See also Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225, 1971; of Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551, 1972.
>
> * * * * * * *
>
> "Thus the 'tender years presumption' in addition to its other faults, works an unconstitutional discrimination against the respondent."

It is difficult to imagine a more pointed difference of opinion regarding the application of this Court's recent de-

cisions relating to gender-based discrimination than has been determined in these states. The rule of law which acted agaist the Petitioner's interest in the instant action cannot be unconstitutional in New York and constitutional in Oklahoma and yet such is now the circumstance present in these jurisdictions. Such a situation emphasizes the immediate and pressing need for determination of the issue by this Court.

CONCLUSION

The decision of the Oklahoma Supreme Court as set out in the appended opinion is founded upon a pervasive form of sex discrimination which denies the Petitioner's constitutionally protected right to equal protection of the law and Petitioner respectfully requests that a Writ of Certiorari issue to review such decision of the Oklahoma Supreme Court entered in this cause on February 7, 1978.

Respectfully submitted,

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July, 1978

APPENDIX A

[577 P.2d 1271]

Maxine Dee GORDON, Appellant,
v.
Gary Stephen GORDON, Appellee.

No. 49371.

Supreme Court of Oklahoma.

Feb. 7, 1978.

Rehearing Denied April 19, 1978.

[577 P.2d at 1272]

Appeal from the District Court of Oklahoma County; Joe Cannon, Judge.

Appeal by wife from the trial court's award of custody of three-year-old child of the parties to the husband in a divorce action absent a judicial finding of unfitness on the part of the mother. She alleges the order was clearly against the weight of the evidence and that the trial court abused its discretion.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Fagin, Hewett, Mathews & Fagin, Arnold D. Fagin, Cliff A. Jones, Legal Intern, Oklahoma City, for appellant.

William B. Rogers, Don D. Laudick, Ames, Daugherty, Black, Ashabranner, Rogers & Fowler, Oklahoma City, for appellee.

SIMMS, Justice:

In a divorce action, the trial court awarded custody of three-year-old Danny Gordon to his father, Gary Gordon. His mother, Maxine Gordon, now Frank, appeals. We reverse the Trial Court.

Maxine Gordon filed this action for divorce in January of 1975, alleging that through the defendant's fault the parties had become incompatible. She sought custody of Danny, who was then two-years-old; child support; alimony and division of property. By ex parte order, Danny's temporary custody was placed with the plaintiff and defendant was ordered to make payments for the support of plaintiff and the minor child during the pendency of the action.

Defendant answered and denied all plaintiff's material allegations. He also filed a cross-petition seeking divorce for himself and division of property. Several weeks before trial on the issues was held in January of 1976, defendant amended his cross-

[577 P.2d at 1273]

petition to request that custody of Danny be placed with him.

The trial court granted divorce to both parties, entered certain orders regarding division of property and alimony, and awarded custody of Danny to defendant. The award of custody is the only issue before us on appeal. For convenience the parties will be referred to by their designation in the trial court.

Testimony pertaining to Danny which is relevant to this appeal can be summarized as follows. Plaintiff had taken care of Danny since his birth. She was not employed and the overwhelming majority of her time was spent at home with him. Testimony revealed that until, and during, the pendency of this action, Danny had been away from plaintiff only a few hours a week. He was enrolled in a music school which met for two hours on two mornings a week and he was cared for by a baby-sitter approximately one to one-and-a-half hours a week while the plaintiff played tennis. During another period of time, not simultaneous with the music school, Danny had been in a "mother's day out" program at a church on Fridays. Other than these periods of time, Danny was constantly with his mother.

The defendant worked six days and at least one night each week in the family business. At the time of trial he lived with his parents who also worked at least six days a week in the family business.

Plaintiff testified that when the parties lived together, the defendant spent no time with Danny. This testimony was not disputed by defendant.

Plaintiff testified that since the parties had separated, Danny visited with his father on Sundays, and that while he liked to go visit his father, he loved to come back home.

The defendant testified that Danny was "thrilled" to see him for visitation periods and that Danny enjoyed those times tremendously.

It was defendant's further testimony that Danny had told him that he didn't want to go home to his mother because he got lonesome when she left him with a baby-sitter while she played tennis.

Defendant complained on direct examination that plaintiff had refused to allow him to see Danny on certain occasions and, on cross-examination, he requested the court to set out specific times for his visitation periods.

There was no attempt to show that the plaintiff was unfit in any manner to have custody of Danny. In fact, during his opening statement, counsel for defendant declared to the court that:

> "The defendant will also ask the Court to award him custody of the minor child of the parties, not on the basis that the plaintiff is an unfit mother because the evidence would not justify that, but that the interest of the minor child would be best served by his residence and custody in his father."

During closing argument, counsel for defendant acknowledged to the court that ". . . Now, I realize there is

not a strong case to be made for custody of the child in Gary. I know where the evidence is." And, counsel further stated:

> "We would ask at a minimum that the Court direct Mrs. Gordon to remain within the custody of this Court until at least the child is through grade school so that his father can have an opportunity to see his child for whom he is certainly willing to pay support."

These statements, while not evidence, certainly offer an indication of how the parties and their counsel perceived the evidence.

Announcing his judgment, the trial court stated in part that:

> "I listened and tried to analyze all of the evidence that I heard in this case and like a lot of cases, I think the evidence is—it's not a question of one party is not fit to have the children.
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> " * * *
>
> "And I think what what (sic) I heard and putting reasonable inference between the lines, it is my judgment that the best
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> [577 P.2d at 1274]
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> interest of this child will be served by giving custody of it to the father. I think in the long run with the interest of these people with what I can see, at least what I think I can see deep down in them, I think this little boy will have a better chance. That's going to be my judgment and it will be my ruling. Not that she's unfit; I'm just not too sure that some of the things in her life are a lot more important than some of the things that I think are more important for the benefit of this child . . . I just have a gut feeling that it's going to be the best thing for this child to put custody in his father, from what I've heard. Maybe I'm wrong, I don't know, but that is what I'm supposed to do is what I think."

Post-trial proceedings, regarding the custody of Danny pending this determination on appeal, were held in this Court and before the trial court and Danny is currently in the custody of his father.

Urging reversal of the trial court's award of custody, plaintiff first argues that because Danny is a child of tender years that the court abused its discretion by awarding Danny's custody to defendant in the absence of a showing of unfitness on her part. In support thereof, plaintiff relies on 30 O.S.1971, § 11, which states:

> "In awarding the custody of a minor, or in appointing a general guardian, the court or judge is to be guided by the following considerations:
>
> 1. By what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare; and if the child be of sufficient age to form an intelligent preference, the court or judge may consider that preference in determining the question.
>
> 2. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child be of tender years, it should be given to the mother; if it be of an age to require education and preparation for labor or business, then to the father."

Plaintiff cites numerous decisions of this Court[1] decided under 30 O.S.1971, § 11, which set forth the general rule that in this jurisdiction the mother is recognized as the natural and preferred custodian of a child of tender years; that other things being equal, unless the mother is clearly shown to be an improper person to be intrusted

[1] *E. g., Blackwood* v. *Blackwood*, 204 Okl. 317, 229 P.2d 602 (1951); *Miracle* v. *Miracle*, Okl., 360 P.2d 712 (1961); *Hurt* v. *Hurt*, Okl., 315 P.2d 957 (1957); *Earnst* v. *Earnst*, Okl., 418 P.2d 351 (1966); *Irwin* v. *Irwin, Okl.*, 416 P.2d 853 (1966); *Waller* v. *Waller*, Okl., 439 P.2d 952 (1968).

with its care and custody, a child should be placed in her custody. The rule further recognizes that a child of tender years needs the constant bestowal of its mother's care and love and that the courts are, therefore, loath to deprive a mother of her child's custody where she is a fit and proper person.

Plaintiff further argues that the trial court's finding that Danny's best interests would be served by placing custody in his father is manifestly against the weight of the evidence, and that the trial court therefore abused his discretion.

In support of this argument, plaintiff primarily relies upon the fact that because of defendant's work schedule he must leave Danny in the care of a maid or housekeeper for 90% of the child's waking hours. Plaintiff maintains that the trial court's judgment removed Danny from his mother—the person who had been his primary caretaker since his birth and who was admitted by defendant to be a good mother and a fit and proper person to have Danny's custody—and placed him in the actual care of a person in the employ of defendant whose identity and qualifications were unknown to the court. This result, plaintiff contends, is clearly against the weight of the evidence and is, in fact, detrimental to Danny's best interests.

Plaintiff additionally maintains that the trial court's judgment was obviously against the weight of the evidence as to

[577 P.2d at 1275]

Danny's best interests because testimony showed that because of his personality, defendant would not be the better custodian of Danny. According to plaintiff's testimony, defendant's disposition was certainly less than cheerful. Plaintiff testified that she was seeking a divorce from defendant because, among other things, he was withdrawn and uncommunicative and had a very bad temper. In regard to his temper, plaintiff stated that defendant had

ripped up articles of his clothing and had thrust his fist through a closed door.

Defendant argues that the trial court's award of Danny's custody to him was a proper exercise of the court's discretion and that the court's determination that Danny's best interests would be served by this placement is supported by the evidence. Defendant points out that the trial court was able to directly observe the parties and their demeanor and that because of this observation it was better able to decide which parent would be the better custodian. In support thereof defendant relies upon certain testimony presented at trial which, in his opinion, showed plaintiff to be an overly "materialistic" person. Defendant also contends that because the court must be primarily guided by the child's best interests, where the evidence shows that those best interests will be better served by living with the father, the mother need not be shown to be unfit to have custody. Defendant cites and relies upon *Morrow* v. *Morrow*, Okl., 383 P.2d 24 (1963) and *Brim* v. *Brim*, Okl.App., 532 P.2d 1403 (1975) to support his contention, that "unfitness" by the mother need not be shown to place custody of a child of tender years with its father.

[1] Neither *Morrow, supra,* nor *Brim, supra,* involved an original award of custody. Both cases arose from judgments in motion to modify decree provisions. As a change of custody on a motion to modify presents separate questions and different legal issues than those raised in original custody award actions,[2] those decisions are not controlling here.

Additionally, defendant contends that this Court should not reverse the trial court's award of custody to him in reliance upon the maternal preference provision of 30 O.S. 1971, § 11 because that preference is an unconstitutional discrimination against defendant based upon his sex. De-

[2] *Gibbons* v. *Gibbons*, Okl., 442 P.2d 482 (1968).

fendant submits that the maternal preference for custody of young children denied him, as Danny's father, equal protection of the laws. Defendant argues that gender-based classifications are now "inherently suspect" and must be reviewed under "strict judicial scrutiny." In support of this argument, defendant relies primarily on the recent Supreme Court decisions of *Frontiero* v. *Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) and *Reed* v. *Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971).

Reed, *Frontiero*, and their progeny[3] do not however, support defendant's contention that gender is now a "suspect" classification for equal protection purposes.

In *Reed*, the Supreme Court struck down a provision of Idaho's probate code which gave a mandatory preference to males over females as executors of decedents' estates although both were otherwise equally entitled to serve. Relying on *Royster Guano Co.* v. *Virginia*,[4] (a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike"), the Court reviewed the Idaho gender classification under the traditional "rational bases" standard. Finding that the only purpose of the provision was to reduce the workload of probate courts by eliminating hearings on

[577 P.2d at 1276]

the merits, the Court held the preference violative of the Equal Protection Clause.

[3] *Kahn* v. *Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974); *Schlesinger* v. *Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Weinberger* v. *Wisenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975); *Stanton* v. *Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975); *Craig* v. *Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed2d 397 (1976).

[4] 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920).

In *Frontiero*, the Supreme Court held that a statutory provision which differentiated between male and female members of the uniformed services as to eligibility for dependents' benefits unconstitutionally discriminated against women in violation of the due process clause of the Fifth Amendment. The Court discussed at length our Nation's "long and unfortunate history of sex discrimination" (Id., 41 U.S. at 684, 93 S.Ct. at 1769) which had, among other injustices, denied women even the most basic civil and political rights—participation in the electoral process and ownership of property. It was "with these considerations in mind" that the Court concluded that "'classifications based on sex . . . are inherently suspect, and must therefore be subjected to strict judicial scrutiny." (Id. at 683, 93 S.Ct. at 1768.) The only purpose for the provision, as conceded by the government, was mere administrative convenience, and the Court held that different treatment of male and female military personnel "*solely* for the purpose of achieving administrative convenience" was unconstitutional. (Id. at 690, 93 S.Ct. at 1772.)

It is very important, however, to stress two points about *Frontiero*. First, it was only a plurality opinion as to the holding that sex is a "suspect" classification requiring the stricter standard of review. Second, since *Frontiero*, the Court has retreated from the plurality's analysis of sex as a "suspect" classification and that holding has not been followed in any subsequent decision.

Instead, the Court has fashioned a new "middle-tier" standard of equal protection review under which it has analyzed certain classifications such as gender. While the existence of this recently evolving third standard is obvious and has received considerable comment,[5] the mechanics

[5] See e. g. The Supreme Court 1971 Term-Forward, 86 Harv.L.Rev. 1 (1972); Wilkinson, The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality, 61 Va.L.Rev. 945 (1975); Nowak, Realigning the Standards of Review under the Equal

of the test's application are not yet clearly developed. Basically, it is a "means focused" ground of review which subjects certain classifications, such as gender, to a more critical examination than they would receive under the deferential lower-tier "rational basis" test but, being less stringent than the upper-tier "strict scrutiny" review, it relieves the judiciary of making the numerous value judgments inherent in that analysis.

The most recent, and by far the strongest, enunciation of this "middle-tier" standard is found in *Craig* v. *Boren*, *supra*, where the Court struck down Oklahoma's age-sex differential for sale of 3.2 beer. Obviously expanding the "rational relationship" standard of *Reed*, the Court declared that:

> "Classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."[6]

[2] Clearly then defendant is not correct in his contention that gender is currently a "suspect" classification for equal protection purposes.

[3] Under even the heightened review required by middle-tier analysis, our maternal preference custody provision of 30 O.S. 1971, § 11 is constitutional.

This is not a situation like *Reed* or *Frontiero* where the sole purpose for the classification is administrative convenience. Here, on the contrary, the classification serves the undisputedly important objective of assuring that children

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[5] (Continued)
Protection Guarantee-Prohibited, Neutral and Permissive Classifications, 62 Geo.L.J. 1071 (1974); See also, *Craig* v. *Boren*, *supra*, 429 U.S. 210-228, 97 S.Ct. 463-473, 50 L.Ed.2d 415-426 (Powell, J. and Stevens, J., Concurring Opinions; Burger, C. J. and Rehnquist, J., Dissenting Opinions); *Wright* v. *Keiser*, Okl., 568 P.2d 1262, 1268 (1977) (Lavender, J., Dissenting Opinion).

[6] 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397, 407.

whose parents have severed their marriage relationship, will be placed in the custody of that parent most

[577 P.2d at 1277]

apt to provide them with the best care and protection. Neither party challenges the importance of the State's interest in providing for the welfare of its minor citizens, nor questions the legitimacy of the State's involvement in this decision making process.

We are of the opinion that the gender-based means chosen by our Legislature are substantially related to this important objective and the classification scheme is constitutional. It is indeed an old notion that a child of tender years needs a mother more than a father, but defendant has not persuaded us that this notion is either unsound or unconstitutional. We believe that consideration of the cultural, psychological and emotional characteristics that are gender related make this custodial preference one of "those instances where the sex-centered generalization actually [comports] to fact." *Craig* v. *Boren*, *supra*, 429 U.S. at 199, 97 S.Ct. at 458, 50 L.Ed.2d at 408. The statute's additional provision that children who are of an age to require education and preparation for labor or business should be placed in the father's custody further reinforces our decision. This provision makes clear the essential fact that this statute is not concerned entirely with the "rights" of parents to their children. In addition to, and far beyond, their rights, the paramount purpose of the statute is to serve the welfare and best interests of children.

We agree with the reasoning of the Supreme Court of Utah in their recent decision of *Cox* v. *Cox*, *Utah*, 532 P.2d 994, 996 (1975). There a father of young children challenged the court's award of custody to their mother, supporting his appeal upon the additional authority of Utah's "equal rights" amendment. The Court shared his view that mothers have no "absolute or invariable right" to custody and that fathers' rights and interests are entitled to equal

and just consideration. The Court stressed however, that this equality of consideration "does not mean that the law must pretend to be unaware of and blindly ignore obvious and essential biological differences." In light of the statute's primary concern—the welfare and adjustment of children—the Court found that "there is wisdom in the traditional patterns of thought that the roles of the mother and father in the family are such that, all other things being comparatively equal, the children should be in the care of their mother, especially so children of younger years; and that this may be true even where the divorce is granted to the father."

[4] There is nothing within this statute which prohibits a judge from placing a child, regardless of his or her age, with the father where the evidence supports a finding that the father will be the better custodian and paternal custody will serve the child's best interests.

[5] The gender preferences of 30 O.S. 1971, § 11, are intended to direct the trial court's determination of custody only when the scales are relatively balanced between the attributes of both parents, and the statute should be used only in such a situation.

If the Legislature should determine that our contemporary social structure demands a change in the traditional family roles that have been part of our culture since its beginning, they may enact legislation reflecting that change. Meanwhile, the expression of those roles as embodied in 30 O.S. 1971, § 11, is not unconstitutional.

[6] The evidence in this case did not support the trial court's finding that Danny's welfare and best interests would be best served by placing his custody with his father, the defendant. Plaintiff was shown to be a fit and proper person to have Danny's custody and the award of custody to defendant was clearly against the weight of the evidence. The trial court did, as urged by plaintiff, abuse his discre-

tion by ordering Danny's custody placed with his father rather than with his mother, as directed by 30 O.S.1971, § 11. *Blackwood* v. *Blackwood*, Okl., 229 P.2d 602 (1951); *Waller* v. *Waller*, Okl., 439 P.2d 952 (1968).

[7] As discussed above, certain post-trial proceedings regarding Danny's custody pending the outcome of this appeal were held both in this Court and in the trial court. In an effort to eliminate the possi-

[577 P.2d at 1278]

bility of future litigation arising by reason of the Special Master's findings regarding Danny's custody pending this appeal, we take this opportunity to expressly find that the issues raised and litigated at that hearing are now moot. In this appeal from the divorce decree we are not concerned with whether the Special Master's award of temporary custody to defendant was correct based upon the facts presented at that time and we are of the opinion that any further consideration of those facts by the trial court would be irrelevant and unnecessary.

We REVERSE AND REMAND WITH INSTRUCTIONS to place Danny in the custody of his mother and to hold further hearings to determine the issues of the father's visitation periods and the amount of child support.

HODGES, C. J., and IRWIN, BERRY and DOOLIN, JJ., concur.

BARNES, J., concurs in part, dissents in part.

WILLIAMS, J., joins with BARNES, J.

LAVENDER, V. C. J., dissents.

BARNES, Justice, concurring in part and dissenting in part:

I concur in that part of the opinion which holds that 30 O.S.1971, § 11, is constitutional. I dissent to that part of the opinion which finds that the evidence in his case did

not support the Trial Court's finding that the child's best interest would be best served by placing his custody with the father.

I am authorized to state that Justice Williams concurs in the views herein expressed.

APPENDIX B

FILED IN DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
FEB 6 1976
DAN GRAY, Court Clerk
By ..... Deputy

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

MAXINE DEE GORDON,	)	
	)	
Plaintiff,	)	
vs.	)	No. JFD-75-232
	)	
GARY STEPHEN GORDON,	)	
	)	
Defendant.	)	

DECREE OF DIVORCE

This cause came on to be heard before the undersigned Judge of the District Court in and for Oklahoma County, Oklahoma, the 26th day of January, 1976, pursuant to regular setting, upon the Petition for divorce filed herein by plaintiff and the Counterclaim for divorce filed by the defendant; and the plaintiff appeared in person and by her attorney, James M. Little, and the defendant appeared in person and by his attorney, William B. Rogers;

Whereupon, the parties announced ready for trial and agreed that said cause may be heard by the Court and determined on its merits without delay;

And the Court having heard the oral testimony of witnesses duly sworn and examined in open court, the evidence offered on behalf of both parties, and the statements of counsel, and being fully advised in the premises and on consideration finds as follows:

1. That this Court has jurisdiction of this cause and of the parties hereto.

2. That the parties at the time of the filing of the Petition and Counterclaim herein were and had been actual residents in good faith of the State of Oklahoma for more than six months next preceding the filing of such Petition and such Counterclaim, and were at the time of such filing, actual residents in good faith of Oklahoma County, and had been for more than thirty days prior thereto.

3. That the parties to this action were married on the 10th day of August, 1969, at St. Louis, Missouri, and have ever since been husband and wife.

4. That one child has been born of such marriage, namely, Daniel Jonathan Gordon, born January 28, 1973.

5. That the parties hereto have during the course of their marriage acquired certain real and personal property which is subject to division by this Court.

6. That the marriage relationship of the parties has become incompatible, and both parties are entitled to be awarded a divorce from the other.

7. That the best interests and the mental, temporal and moral welfare of the minor child of the parties hereto would be best served by awarding of the custody of such child to the defendant Gary Stephen Gordon.

8. That the plaintiff, Maxine Dee Gordon, should be awarded the right and privilege to visit with the minor child of the parties at reasonable times and on seasonable occasions.

9. That the plaintiff, Maxine Dee Gordon, should be awarded as alimony by the way of support the

sum of $6,000.00, payable at the rate of $1,000.00 per month for a period of six months beginning on the first day of February, 1976, and payable on the first day of each succeeding month thereafter until fully paid.

10. That the plaintiff, Maxine Dee Gordon, should have by way of division of property the sum of $18,000.00, payable at the rate of $200.00 per month beginning the first day of August, 1976, and payable on the first day of each succeeding month thereafter until fully paid, together with the Monte Carlo automobile now in her possession, free and clear of any mortgage, or other encumbrance, or if the defendant is unable to effect delivery of such automobile to the plaintiff, then the sum of $2,000.00, also payable the first day of February, 1976.

11. That the residence of the parties at 2425 N. W. 111th Street in Oklahoma City, Oklahoma, shall be sold, and the net proceeds from such sale after payment of mortgage indebtedness and expenses of sale shall be divided equally between the plaintiff and the defendant.

12. That the personal belongings, including clothing, shall be awarded to the respective parties.

13. That the furnishings contained within the residence of the parties at 2425 N. W. 111th Street shall be awarded to the defendant, Gary Stephen Gordon.

14. That the defendant, Gary Stephen Gordon, should receive and be awarded as his share of property of the parties, and to have and possess as his sole and separate property, free and clear of any claim or right of the plaintiff therein, in full and complete satisfaction and release of all his property

rights any and all remaining property, real, personal, or mixed, not herein specifically awarded to the plaintiff, which has been acquired by plaintiff and defendant, or by the defendant, including but not limited to the interest of the defendant in the profit sharing plan of DWG, Inc., d/b/a Samuel Gordon and Company.

15. That the defendant, Gary Stephen Gordon, should be relieved from any obligation to pay any indebtedness of the parties incurred at any time prior to the date hereof, except as specifically referred to herein, except that he shall on or before February 15, 1976, pay the following, if the same have not already been paid:

1.	Jack Blackwell, County Treasurer of Oklahoma County, 1975 Personal	65.00
2.	The Shorthand Reporters, deposition expense of Gary Stephen Gordon	79.40
3.	Riggs Plumbing, Heating and Airconditioning Co.—plumbing repair to residence, 2425 N. W. 111th	197.76
4.	Medical Arts Laboratory, Maxine Gordon	5.00
5.	James C. Hammack, D.D.S.	11.00
6.	Gerald Rogers, M. D.	10.00
7.	Car Safety Inspection	5.57
8.	Residence Roof repair and dishwasher	30.55
9.	Service Fees for subpoenas	60.00

16. That the defendant, Gary Stephen Gordon, shall pay an additional fee to the plaintiff's counsel, James M. Little, in the amount of $500.00, payable the first day of February, 1976.

17. That the parties should be required and directed to execute proper deeds of conveyance, assignments, bills of sale, or muniments of title to each other to carry out the terms of this decree as hereinabove more specifically set forth.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. That this Court has jurisdiction of this cause and of the parties hereto.
2. That the parties at the time of the filing of the Petition and Counterclaim herein were and had been actual residents in good faith of the State of Oklahoma for more than six months next preceding the filing of such Petition and such Counterclaim, and were at the time of such filing, actual residents in good faith of Oklahoma County, and had been for more than thirty days prior thereto.
3. That the parties to this action were married on the 10th day of August, 1969, at St. Louis, Missouri, and have ever since been husband and wife.
4. That one child has been born of such marriage, namely, Daniel Jonathan Gordon, born January 28, 1973.
5. That the parties hereto have during the course of their marriage acquired certain real and personal property which is subject to division by this Court.
6. That the plaintiff and the defendant be and are hereby granted an absolute decree of divorce from the other, and the marriage relation heretofore existing between them is dissolved, and both parties are released from the same, provided that neither party shall be permitted to remarry for a period of six months next succeeding the date hereof.

7. That the care, custody and control of the minor child of the parties hereto, to wit Daniel Jonathan Gordon, be and is hereby awarded to the defendant, Gary Stephen Gordon; the plaintiff, Maxine Dee Gordon, is awarded the right and privilege to visit said child at reasonable times and on seasonable occasions.

8. The defendant is hereby ordered to pay Maxine Dee Gordon as alimony by way of support the sum of $6,000.00, payable at the rate of $1,000.00 per month for a period of six months, beginning the first day of February, 1976, and payable on the first day of each succeeding month thereafter until fully paid.

9. The plaintiff, Maxine Dee Gordon, shall have, by way of division of property, and the defendant is hereby ordered to pay, the sum of $18,000.00, payable at the rate of $200.00 per month, beginning the first day of August, 1976, and payable on the first day of each succeeding month thereafter until fully paid, together with the Monte Carlo automobile now in her possession, free and clear of any mortgage or other encumbrance, or in the alternative, the sum of $2,000.00, payable the first day of February, 1976.

10. The residence of the parties at 2425 N. W. 111th in Oklahoma City, Oklahoma, shall be sold, and the net proceeds from such sale after payment of mortgage indebtedness, and expenses of sale, shall be divided equally between the plaintiff and the defendant.

11. The personal effects, including clothing, of the parties, are hereby awarded to them respectively.

12. The furnishings contained in the residence of the parties at 2425 N. W. 111th Street in Oklahoma

City, Oklahoma, shall be and become the property of the defendant, Gary Stephen Gordon.

13. The defendant, Gary Stephen Gordon, shall receive and is hereby awarded as his separate share of the property of the parties, to have and possess as his sole and separate property, free and clear of any claim or right of the plaintiff therein, in full and complete satisfaction and release of all his property rights, any and all remaining property, real, personal or mixed, not herein specifically awarded to the plaintiff or by the defendant, including but not limited to the interest of the defendant in the profit sharing plan of DWG, Inc., d/b/a Samuel Gordon and Company.

14. That the defendant, Gary Stephen Gordon, is hereby relieved from any obligation to pay any indebtedness of the parties incurred at any time prior to the date hereof, except as specifically referred to herein, and excepting further that he shall on or before the 15th day of February, 1976, pay the following:

1.	Jack Blackwell, County Treasurer of Oklahoma County, 1975, Personal	65.00
2.	The Shorthand Reporters, deposition expense of Gary Stephen Gordon	79.40
3.	Riggs Plumbing, Heating and Airconditioning Co.,—plumbing repair to residence, 2425 N. W. 111th	197.76
4.	Medical Arts Laboratory, Maxine Gordon	5.00
5.	James C. Hammack, D.D.S.	11.00
6.	Gerald Rogers, M. D.	10.00
7.	Car Safety Inspection	5.57
8.	Residence Roof repair and dishwasher	30.55
9.	Service Fees for subpoenas	60.00

15. That the defendant, Gary Stephen Gordon, shall pay as additional fee to the plaintiff's counsel, James M. Little, the amount of $500.00, payable the first day of February, 1976.

16. The parties and each of them is hereby required and directed to execute proper deeds of conveyance, assignments, bills of sale, or muniments of title to each other, to carry out the terms of this decree, as hereinabove more specifically set forth; and it is ordered by the Court that upon the failure of either of said parties to execute such instruments within ten days of date hereof, this decree will operate as such conveyance, as herein provided.

It is further considered and ordered by the Court that all Orders heretofore entered in this cause be and the same are hereby vacated and merged with this decree.

s/ Joe Cannon
JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:

s/ James M. Little
JAMES M. LITTLE
Attorney for plaintiff

s/ William B. Rogers
WILLIAM B. ROGERS
Attorney for defendant

I, DAN GRAY, Court Clerk for Oklahoma County, Okla., hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears of record in the District Court Clerk's Office of Oklahoma County, Okla., this 6th day of February, 1976.

DAN GRAY, Court Clerk
By (illegible), Deputy

APPENDIX C

FILED
SUPREME COURT
STATE OF OKLAHOMA
FEB 27 1976
ROSS N. LILLARD, JR.
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

MAXINE DEE GORDON, Appellant,	)	
vs.	)	No. 49,371
GARY STEPHEN GORDON, Appellee.	)	

PETITION IN ERROR

COMES NOW Gary Stephen Gordon, appellee, by his attorney William B. Rogers, and for his Petition in Error shows the Court as follows:

(a) This is an appeal from the District Court in and for Oklahoma County.

(b) The style and number assigned to the case in the trial court was Maxine Dee Gordon, plaintiff, vs. Gary Stephen Gordon, defendant, No. JFD-75-232.

(c) The plaintiff sought divorce from the defendant on the grounds of incompatibility together with custody of the minor child of the parties, division of property, child support, and alimony. The defendant counterclaimed for divorce by reason of the fault of the plaintiff and also sought custody of the minor child. He denied the accumulation by the parties of any joint property.

(d) The decision to be reviewed was announced on January 26, 1976, and Decree of Divorce was signed and filed on February 6, 1976.

(e) The plaintiff Maxine Dee Gordon filed a Motion For Reconsideration Of Judgment As To Child Custody Or In The Alternative For A Motion For New Trial the 3rd day of February, 1976, which Motion was overruled the 12th day of February, 1976.

(f) The appellee and counterappellant Gary Stephen Gordon asserts that the trial court erred in finding that the parties had during the course of their marriage acquired certain real and personal property which was subject to the division by the court, such findings being contrary to law and not supported by the evidence. The court further erred in awarding to the plaintiff there, Maxine Dee Gordon, alimony by way of support, such award being not supported by any evidence, and contrary to law. The court also erred in attempting to dispose of the residence of the parties which was acquired through separate funds of the crossappellant, Gary Stephen Gordon.

(g) The crossappellant, Gary Stephen Gordon, requests the Court to reverse the decision of the trial court insofar as the same purports to divide any jointly acquired property of the parties and insofar as the same awards the plaintiff-appellant Maxine Dee Gordon alimony.

s/ William B. Rogers
William B. Rogers
219 Couch Drive
Oklahoma City, Oklahoma 73102

Attorney for counterappellant

CERTIFICATE OF MAILING

This is to verify that a true and correct copy of the above and foregoing Petition In Error was mailed this 27th day of February, 1976, to James M. Little, Esq., Conner, Little & Conner, 630 Hightower Building, Oklahoma City, Oklahoma 73102, and to Arnold Fagin, Esq., Fagin, Hewett, Mathews & Fagin, Fidelity Plaza, Oklahoma City, Oklahoma 73102.

s/ William B .Rogers
William B. Rogers

A copy of the Petition In Error was also filed with the Clerk of the District Court of Oklahoma County. There are no unrepresented parties, and Maxine Dee Gordon is the only represented party.

s/ William B .Rogers
William B. Rogers

Supreme Court, U. S.
FILED
AUG 15 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-105

GARY STEPHEN GORDON,
Petitioner,

VERSUS

MAXINE DEE GORDON (now FRANK),
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

ARNOLD D. FAGIN
CLIFFORD A. JONES
810 Fidelity Plaza
Oklahoma City, Oklahoma 73102

Attorneys for Respondent

of Counsel:

FAGIN, HEWETT, MATHEWS & FAGIN
810 Fidelity Plaza
Oklahoma City, Oklahoma 73102

August, 1978

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

INDEX

PAGE

TABLE OF AUTHORITIES ii

ADDITIONAL QUESTIONS PRESENTED 1

SUPPLEMENTAL STATEMENT OF THE CASE 3

REASONS FOR DENYING WRIT OF CERTIORARI 5

I. The decision of the Supreme Court of Oklahoma rests on an adequate and independent state ground 5

II. The question presented for review by petitioner was not timely raised in the Supreme Court of Oklahoma 8

III. Petitioner lacks standing to challenge the Oklahoma custody statute because he will not benefit even if this Court were to strike it down 9

IV. The decision of the Supreme Court of Oklahoma is not inconsistent with this Court's decision on gender-based classifications 12

V. The constitutionality of the Oklahoma custody statute is not ripe for decision because this case lacks a full record adequate to sharply frame the issue 16

VI. The Oklahoma and New York courts are not in conflict on the constitutional question presented herein 18

CONCLUSION 20

CERTIFICATE OF SERVICE follows Brief.

TABLE OF AUTHORITIES

Cases **PAGE**

Craig v. Boren, 429 U.S. 190 (1976) 11, 12, 15, 19
Frontiero v. Richardson, 411 U.S. 677 (1973) 12
Gordon v. Gordon, 577 P.2d 1271 (Okl. 1978) 6, 13, 15
Hanson v. Denckla, 357 U.S. 235 (1958) 8
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 8
Reed v. Reed, 404 U.S. 71 (1971) 12
Schlesinger v. Ballard, 419 U.S. 498 (1975) 12
Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972) .. 17
Stanley v. Illinois, 405 U.S. 645 (1972) 12
Stanton v. Stanton, 421 U.S. 7 (1975) 12, 13
State ex rel. Watts v. Watts, 77 Misc.2d 178, 250 N.Y.S. 2d 285 (1973) 18, 19
United States v. Johnson, 268 U.S. 220 (1925) 7
United States v. Raines, 362 U.S. 17 (1960) 10
Warth v. Seldin, 422 U.S. 490 (1975) 10
Weinberger v. Weisenfeld, 420 U.S. 636 (1975) 12
Zacchini v. Scripps-Howard Broadcasting Co., ... U.S. ...., 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) 5

Statutes

30 Okl.Stat. 1971 §11 ..... 3, 6, 13, 15, 19

Miscellaneous

Bradbrook, "The Relevance of Psychological and Psychiatric Studies to the Future Development of the Laws Governing the Settlement of Inter-parental Child Custody Disputes," 11 J. Family Law 557 (1971) 13-14

In the
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-105

GARY STEPHEN GORDON,
Petitioner,

VERSUS

MAXINE DEE GORDON (now FRANK),
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

The respondent, Maxine Dee Gordon, now Frank, respectfully prays that this Court deny the writ of certiorari to the Supreme Court of Oklahoma prayed for by petitioner.

ADDITIONAL QUESTIONS PRESENTED

In addition to the question presented by petitioner, the Record raises the following questions for consideration by this Court:

1. Whether a state court's ruling that the evidence showed the mother to be a superior custodian of a minor child rests on an adequate and independent state ground when the state court also passed on a federal constitutional question which was not necessary to the decision.

2. Whether a father who failed at trial to demonstrate that the best interests of his minor child would be served by paternal custody lacks standing to challenge the application of a custody statute which provides a maternal preference "tie-breaker" for use when things are equal, because the application of an absolutely gender-neutral custody criterion would not benefit him.

3. Whether the question of which party bears the burden of proof respecting the validity of a statute alleged to deny equal protection on the basis of gender, which question could have been timely raised but was not presented to the state court until rehearing, is properly before this Court.

4. Whether the Supreme Court of Oklahoma's ruling that a post-hearing tie-breaker maternal preference provision does not deny equal protection to a father unable to prove the child's interests are best served by paternal custody is ripe for review where the record is devoid of evidence essential to a sound constitutional decision.

5. Whether the Supreme Court of Oklahoma's ruling that a post-hearing tie-breaker maternal preference provision does not deny equal protection to a father unable to prove the child's interests are best served by paternal custody is a correct application of this Court's decisions concerning gender-based discrimination.

SUPPLEMENTAL STATEMENT OF THE CASE

Respondent offers the following material to supplement the statement of the case set out by petitioner at pages 4-6 of his Petition and Brief. References to the Petition for Writ of Certiorari will hereafter be abbreviated, *e.g.*, P. at 4-6.

Petitioner's summary of the case makes reference to respondent's (plaintiff-appellant in the court below) "principal contention of error" regarding the post-hearing maternal preference provision of 30 Okl.Stat. 1971 §11 (P. at 5). Petitioner omits any mention of appellant's separate and independent assignment of error, which additional assignment of error contended that the trial judge had abused his discretion in awarding custody of the child to the father because such award was manifestly against the weight of the evidence. This omission is material and substantial because the Supreme Court of Oklahoma sustained respondent's appeal on both grounds asserted. This is relevant to denial of petitioner's application for certiorari because the separate evidentiary question constitutes adequate and independent state grounds and also demonstrates that petitioner herein lacks standing to challenge the Oklahoma statute.

Petitioner suggests (P. at 6) that the federal question was raised by means of plaintiff's (respondent herein) Petition-in-Error. This is incorrect. The federal question was raised for the first time in the brief of appellee (petitioner herein), not in the Petition-in-Error. Furthermore, Appendix C to the Petition contains the Petition-in-Error

filed by petitioner (defendant-appellee in the courts below), not the Petition-in-Error filed by the respondent. Neither Petition-in-Error raises the federal question suggested by petitioner.

Finally, petitioner omits any reference to the fact that the "question presented for review" (P. at 2) was not presented to the Supreme Court of Oklahoma in the form set forth by petitioner. Petitioner's question presented apparently attempts to restate the same question three times, but the third version set forth at page 2 of the Petition contains a reference to the issue of burden of proof in gender-based discrimination cases, which issue was raised by petitioner only upon rehearing before the Supreme Court of Oklahoma. Hence, this issue is not properly before this Court.

REASONS FOR DENYING WRIT OF CERTIORARI

I.

THE DECISION OF THE SUPREME COURT OF OKLAHOMA RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

It is well-settled that this Court lacks jurisdiction to review state judgments where there exists an independent and adequate state ground for the decision. This Court recently restated this principle in *Zacchini* v. *Scripps-Howard Broadcasting Co.*, ... U.S. ....., 97 S.Ct. 2849, 2852-53, 53 L.Ed.2d 965, 970-971 (1977):

> "If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted, *Wilson* v. *Loew's, Inc.*, 355 U.S. 597, 78 S.Ct. 526, 2 L.Ed. 2d 519 (1958), for '[o]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.' *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126, 65 S.Ct. 459, 463, 89 L.Ed. 789 (1945).
>
> * * * * * * *
>
> "Had the Ohio Court rested its decision on both state and federal grounds, either of which would have been dispositive, we would have had no jurisdiction. *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935); *Enterprise Irrigation District* v. *Farmer's Mutual Canal Company*, 243 U.S. 157, 164, 37 S.Ct. 318, 320, 61 L.Ed. 644 (1917)."

The decision of the Supreme Court of Oklahoma rested on both state and federal grounds. The court ruled on the federal question of the constitutionality of the child custody statute and upheld the statute against the challenge that it denied the equal protection of the laws to petitioner. However, the Supreme Court of Oklahoma also grounded its decision on the purely state basis that the trial court's findings were against the weight of the evidence. The Supreme Court of Oklahoma held:

> "There is nothing within this statute which prohibits a judge from placing a child, regardless of his or her age, with the father where the evidence supports a finding that the father will be the better custodian and paternal custody will serve the child's best interests.
>
> * * * * * * *
>
> "The evidence in this case did not support the trial court's finding that Danny's welfare and best interests would be best served by placing his custody with his father, the defendant. Plaintiff was shown to be a fit and proper person to have Danny's custody and the award of custody to defendant was clearly against the weight of the evidence." 577 P.2d at 1277 (P. at A-12).

The substantive state ground is adequate and independent because a finding that a paternal custody award is against the weight of the evidence would have mandated a reversal of the trial court's decision even if the Supreme Court of Oklahoma had ruled that 30 Okl.Stat. §11 is unconstitutional. The evidentiary ruling by the Supreme Court of Oklahoma does not in any manner rest upon an unconstitutional standard, nor does it require the petitioner to overcome an allegedly unconstitutional presumption in favor of the mother. Petitioner suggests (P. at 9) that the standard by which the facts are to be reviewed is itself repugnant to the United States Constitution. This argument is without merit because the Supreme Court of Oklahoma's opinion expressly held that the evidence failed to demonstrate that paternal custody would be in the best interests of the child. It is noteworthy that petitioner made no attempt to direct this Court's attention to any language in the opinion of the Oklahoma Supreme Court which purports to demonstrate the application of an unconstitutional standard of evidentiary review. The truth is that petitioner herein was given an opportunity at trial to prove that paternal custody would serve the best interests of the child. He failed. Even the application of a pure "best interests of the child" test would still have required reversal of the trial court's decision.

The Supreme Court of Oklahoma recited the facts from the record which it weighed in determining whether the trial court's custody award constituted an abuse of discretion. The evidentiary review by the state court was full, fair and untainted by the application of an allegedly improper standard. In any case, this Court has stated "we do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnson*, 268 U.S. 220, 227 (1925) (Holmes, J.).

Hence, the substantive state ground that the trial court's award was manifestly against the weight of the evidence and constituted an abuse of discretion is an adequate and independent state basis for the decision of the Supreme Court of Oklahoma. Accordingly, petitioner's application for writ of certiorari should be denied.

II.

THE QUESTION PRESENTED FOR REVIEW BY PETITIONER WAS NOT TIMELY RAISED IN THE SUPREME COURT OF OKLAHOMA.

This Court has long held that a federal question which is not raised until an application for rehearing before a state court is not properly presented to this Court. *Hanson* v. *Denckla,* 357 U.S. 235, 243-44 (1958); *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120, 128 (1945).

The question presented for review by petitioner in this case falls afoul of this rule because, at least as stated by petitioner at page 2 of his Petition, it was not timely presented to the Supreme Court of Oklahoma. Petitioner's third edition of the question presented for review reads as follows:

> "Stated more broadly, is gender-based discrimination based upon purported 'cultural, psychological and emotional' differences between the sexes constitutional and, if so, who has the burden of proving such differences?"

The issue of burden of proof raised in this statement of the question was not presented to the Supreme Court of Oklahoma prior to its opinion released February 7, 1978. A Petition for Rehearing was denied by the Supreme Court of Oklahoma on April 19, 1978, without opinion. The question of burden of proof was raised by petitioner herein only in his brief in support of his application for rehearing by the Supreme Court of Oklahoma. This being the case, petitioner has failed to preserve this question for review by this Court. Respondent recognizes that the general issue of the validity of Oklahoma's child custody statute was timely raised by the petitioner, but respectfully submits that petitioner is not entitled to expand the issues properly before this Court by means of judicious editing.

III.

PETITIONER LACKS STANDING TO CHALLENGE THE OKLAHOMA CUSTODY STATUTE BECAUSE HE WILL NOT BENEFIT EVEN IF THIS COURT WERE TO STRIKE IT DOWN.

This proposition rests on the same factual basis outlined in respondent's discussion of the adequate and independent state ground which is present in this case. The Supreme Court of Oklahoma has ruled as a matter of *fact* that a paternal custody award in this case was an abuse of discretion because against the weight of the evidence. The necessary corollary to this finding is that the evidence at trial demonstrated that maternal custody would best serve the interests of the child. Therefore, a reversal of the Supreme Court of Oklahoma on the constitutional question herein does not benefit the petitioner because at trial he failed to prove an award of custody to him to be in the best interests of the child. Assuming, *arguendo,* that the Oklahoma child custody statute does deny equal protection to some fathers on the basis of their sex, only a father who can demonstrate that custody in him serves the child's best interests is injured because custody otherwise goes to the mother without regard to any allegedly unconstitutional preference. Hence, petitioner does not fall within that class of persons who would be denied the equal pro-

tection of the law, if indeed the Oklahoma statute denies it to anyone. Petitioner is therefore in the position of trying to assert the constitutional rights of another, rather than his own.

It has long been settled that:

> "One to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States* v. *Raines*, 362 U.S. 17, 21 (1960).

The concept of constitutional *jus tertii* is squarely applicable to this case because petitioner herein is attempting to assert the rights of fathers who are denied the custody of their children where they can demonstrate that paternal custody would be in the best interests of the child. This Court has stated that Article III judicial power exists only to redress or otherwise protect against injury to the complaining party, even though the court's judgment may benefit others collaterally, and that a federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action. *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975).

In this case, petitioner has alleged no personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify the exercise of this Court's remedial powers on his behalf. *Warth* v. *Seldin*, 422 U.S. at 498. Accordingly, petitioner herein lacks standing because he lacks a personal stake in

the outcome and is attempting to assert the constitutional rights of others. This he may not do.

This is not a case like *Craig* v. *Boren*, 429 U.S. 190 (1976), where a failure to allow suit by petitioner might have impaired the rights of the proposed third parties. In this case, consideration of third party rights is properly deferred until another day because any person truly disadvantaged by the allegedly unconstitutional Oklahoma child custody statute is able to assert his own rights and will not have those rights impaired if this Court declines to permit petitioner herein to assert *jus tertii* standing.

Respondent recognizes that she is raising the standing question for the first time before this Court. However, unlike the situation in *Craig* v. *Boren*, *supra*, respondent is raising the standing question at the first opportunity which has been available to her. Prior to the opinion of the Supreme Court of Oklahoma, respondent had obtained no adjudication that a paternal custody award in this case would be against the best interests of the child. Having obtained such an adjudication only in the Supreme Court of Oklahoma, respondent is raising the standing question at the first reasonable opportunity. Furthermore, respondent respectfully submits that it is proper for her to raise the standing issue at this juncture because she is entitled to assert any grounds available in support of the decision of the court below.

IV.

THE DECISION OF THE SUPREME COURT OF OKLAHOMA IS NOT INCONSISTENT WITH THIS COURT'S DECISIONS ON GENDER-BASED CLASSIFICATIONS.

Petitioner argues (P. at 13-20) that the opinion of the Oklahoma Supreme Court is not in accord with this Court's decisions relating to sexual classifications. Petitioner urges this position despite the fact that this case is readily distinguishable from previous rulings by this Court on the question of gender-based classifications. This is not a case in which the reason asserted to justify the challenged gender-based classification is solely administrative convenience, as was the case in *Reed* v. *Reed*, 404 U.S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Schlesinger* v. *Ballard*, 419 U.S. 498, 509-10 (1975). Nor is this a case in which the statute is based upon "increasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas'" such as were present in *Stanton* v. *Stanton*, 421 U.S. 7 (1975), or *Weinberger* v. *Weisenfeld*, 420 U.S. 636 (1975). *Craig* v. *Boren*, 429 U.S. 190, 198-199 (1976). This is not a case which turns upon a denial of due process or considers a statute which entirely excludes one sex from consideration, as was the case in *Stanley* v. *Illinois*, 405 U.S. 645 (1972). And, finally, petitioner's assertions to the contrary notwithstanding, this is not a case which rests entirely upon "old notions" of role typing.

Petitioner attempts to make much of the fact that the Supreme Court of Oklahoma's opinion employed the term

"old notions" in the course of declaring its judgment. The full text of the Supreme Court of Oklahoma statement makes it clear that the *basis* of the court's opinion was not an "old notion":

> "We are of the opinion that the gender-based means chosen by our Legislature are substantially related to this important objective and the classification scheme is constitutional. It is indeed an old notion that a child of tender years needs a mother more than a father, but defendant has not persuaded us that this notion is either unsound or unconstitutional. We believe that consideration of the cultural, psychological and emotional characteristics that are gender related make this custodial preference one of 'those instances where the sex-centered generalization actually [comports] to fact.' *Craig* v. *Boren*, supra, 429 U.S. at 199, 97 S.Ct. at 458, 50 L.Ed.2d at 408." 577 P.2d at 1277 (P. at A-11).

In context, it is apparent that the Supreme Court of Oklahoma chose the term "old notion" in direct response to the attempt by petitioner in the court below to support his challenge to the child custody statute with nothing more than the incantation of a term expressly disapproved by this Court in the course of its striking down an entirely different type of statute in *Stanton* v. *Stanton*, 421 U.S. 7 (1975). The maternal preference provision in 30 Okl.Stat. §11 is more than an old notion; it is the product of judicial experience, codified by the Legislature and verified by the empirical research. In Bradbrook, "The Relevance of Psychological and Psychiatric Studies to the Future Development of the Laws Governing the Settlement of Inter-parental Child Custody Disputes," 11 J. FAMILY

LAW 557, 586-7 (1971), the application of psychological research to the guidelines employed by the courts in determining child custody matters was examined in great detail. After carefully examining the relevant psychological studies and taking due account of conceptual and statistical methodological limitations of the current research, the author concludes that the psychological literature supports the concept that a young child should normally be awarded to its mother. The author states:

> "The boldest justifiable conclusion that can be made on the strength of the prevailing evidence is that, under normal circumstances, *a child under the age of seven is better off with its mother,* as is a girl of any age. Persuasive, though not quite as significant, evidence further suggests that a boy over the age of seven is better off with his father. On the basis of this statement it is possible to argue that, in the case of a boy, custody should be awarded temporarily to the mother if he is under seven years old, but that once he reaches his seventh birthday custody should be changed to the father, assuming that the latter is still willing to become custodian. However, Bowlby has presented evidence to show the frequent changes of home and caretakers produce undesirable results, such as anxiety, depression, and excessive clinging. *Thus, the better choice would seem to be to allow the mother of a boy to retain custody throughout childhood.*" 11 J. FAMILY LAW at 586-7. (emphasis added).

The case before this Court is further distinguishable from any previous gender-based discrimination case because its text provides that the maternal preference is to be applied only if other things are equal. The effect of this is that a trial court awarding custody pursuant to

30 Okl.Stat. §11 hears the evidence and awards the custody based upon the best interests of the child. Only if the evidence is evenly balanced between the parents does the trial court then apply the maternal preference provision.

This is a case in which the legislative scheme satisfies the Constitution by "adopt[ing] procedures for identifying those instances where the sex-centered generalization actually comport[s] with fact." *Craig* v. *Boren,* 429 U.S. 190, 199 (1976). The Oklahoma maternal preference is utilized only after the father has been given a full opportunity to demonstrate his superior individual qualifications—*and has failed.* To the extent that cases relied upon by respondent in her argument to the Supreme Court of Oklahoma hold differently, the Supreme Court of Oklahoma's opinion makes it clear that they do not survive the ruling in this case. The Supreme Court of Oklahoma stated:

> "There is nothing within this statute which prohibits a judge from placing a child, regardless of his or her age, with the father where the evidence supports a finding that the father will be the better custodian and paternal custody will serve the child's best interests.
>
> "The gender preferences of 30 O.S. 1971, §11, are intended to direct the Trial Court's determination of custody only when the scales are relatively balanced between the attributes of both parents, and the statute should be used only in such a situation." 577 P.2d at 1277 (P. at A-12).

Respondent respectfully submits that any constitutional infirmity in the Oklahoma child custody statute has been cured by the narrowing construction given that stat-

ute by the Oklahoma Supreme Court in this case. Under the statute as construed by the Oklahoma Supreme Court, a father who can demonstrate that paternal custody will serve the child's best interests is entitled to custody of the child notwithstanding the "other things being equal" maternal preference provision. The maternal preference provision operates only where the father is unable to demonstrate that the best interests of the child would be served by paternal custody. Therefore, the Oklahoma statute does not deny any father the equal protection of the laws, much less the father in this case, who was unable to prove that his child's best interests would be served by paternal custody.

V.

THE CONSTITUTIONALITY OF THE OKLAHOMA CUSTODY STATUTE IS NOT RIPE FOR DECISION BECAUSE THIS CASE LACKS A FULL RECORD ADEQUATE TO SHARPLY FRAME THE ISSUES.

Petitioner argues at some length (P. at 14-15) that the Supreme Court of Oklahoma lacked evidentiary support for its conclusion that gender generalizations comport to fact. The record in this case contains no such evidence because the constitutional question was not raised by petitioner at the trial court level, but first arose in the appellee's brief. Furthermore, the need for taking evidence to support the statutory classification was not argued by petitioner until his petition for rehearing, after the Supreme Court of Oklahoma had already rendered its opinion.

If the record now lacks evidence required for a constitutional adjudication, the lack is caused by the failure

of petitioner to raise the issue at a time which would have allowed the presentation of evidence. However, to the extent that the record lacks the evidence which petitioner maintains is essential to upholding the constitutionality of the Oklahoma custody statute, yet another reason exists why this Court should not issue a writ of certiorari. In *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583, 588-589 (1972), this Court stated:

> "This Court has recognized in the past that even when jurisdiction exists it should not be exercised unless the case 'tenders the underlying constitutional issues in clean-cut and concrete form.' *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 584, 91 L.Ed. 1666, 1686, 67 S.Ct. 1409 (1947). Problems of prematurity and abstractness may well present 'insuperable obstacles' to the exercise of the court's jurisdiction, even though that jurisdiction is technically present."

Respondent respectfully submits that the doctrine of ripeness is applicable in this case. While jurisdiction may be technically present, the fact remains that it would be premature for this Court to enter a judgment on the constitutionality of the Oklahoma child custody statute in the absence of a full record adequate to sharply frame the issues. The question of child custody touches upon unquestionably sensitive areas of family concern and requires plenary consideration of all factual and expert opinion evidence which can reasonably be brought to bear upon the question.

If this Court were to decide the constitutionality of Oklahoma's child custody statute on the record before it, there exists a substantial risk that important constitutional

questions will be decided in a virtual factual vacuum. Respondent respectfully submits that a factual record adequate to sharply frame the complex issues which would face this Court is essential to a prudently considered resolution of the constitutional issue. Hence, certiorari should be denied because the constitutional issue presented herein is not ripe for adjudication.

VI.

THE OKLAHOMA AND NEW YORK COURTS ARE NOT IN CONFLICT ON THE CONSTITUTIONAL QUESTION PRESENTED HEREIN.

Petitioner argues (P. at 20-22) that the decision of the Supreme Court of Oklahoma in this case is in direct conflict with the case of *State ex rel. Watts* v. *Watts*, 77 Misc.2d 178, 350 N.Y.S.2d 285 (1973). This is in error.

Initially, petitioner cites no authority in support of his implied contention that a conflict between *state* courts is grounds for granting a petition for writ of certiorari. While respondent is aware that this Court is not limited to those specific considerations in granting certiorari set forth in Supreme Court Rule 19, respondent respectfully submits that it is incumbent upon petitioner to demonstrate why the "conflict" outlined in his brief constitutes a reason for granting certiorari. This is particularly appropriate with regard to the particular case cited by petitioner.

The *Watts* case cited by petitioner is not in fact in direct conflict with the decision of the Supreme Court of Oklahoma. Initially, it is clear from reading the *Watts* case that it is the opinion of the Family Court, City of New

York, New York County. The Family Court for the City of New York is far from being a state court of last resort and is apparently only a trial court. Hence, there is no conflict between the opinions of two state courts of last resort and therefore no reasonable basis for granting a writ of certiorari based upon such conflict.

Secondly, and more importantly, the *Watts* case and this case are not in conflict. In *Watts*, the trial court specifically ruled that the effect of the New York custody statute was to abolish the so-called tender years doctrine and the *Watts* case therefore may be explained purely on the basis of statutory interpretation. In contrast, the tender years doctrine in Oklahoma exists as specifically set forth in the statute, 30 Okl.Stat. §11, and is not declared illegal by any other provision of Oklahoma law. Furthermore, the constitutional dictum in the *Watts* decision is erroneously premised upon the concept that sex is a suspect classification for equal protection analysis purposes, a proposition which has never been declared by a majority of this Court. *See, Craig* v. *Boren*, 429 U.S. 190, 217 (1976) (Rhenquist, J., dissenting).

Accordingly, the alleged conflict between the *Watts* case and the decision in this case by the Supreme Court of Oklahoma does not exist and does not constitute grounds for granting a writ of certiorari.

CONCLUSION

This case does not present the "special and important reasons" required by Supreme Court Rule 19 for review on writ of certiorari. Even if jurisdiction is technically present in this Court, respondent respectfully submits that for all the reasons set forth above this Court should exercise its sound judicial discretion and decline to review this case.

Respectfully submitted,

ARNOLD D. FAGIN
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CERTIFICATE OF SERVICE

I hereby certify that I served three (3) printed copies of this Brief of Respondent Opposing Petition for Certiorari upon counsel for the petitioner

William B. Rogers
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by depositing the same in a United States Mailbox, with First Class postage pre-paid, this _____ day of August, 1978.

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Arnold D. Fagin